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November 30, 2010

**Via Electronic Filing**

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

Re: Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., et al, STB Dkt. No. 42121

Dear Ms. Brown:

We represent Defendant CSX Transportation, Inc. ("CSXT") in the above-captioned rate case. We write to respond to allegations and claims raised by Complainant Total Petrochemicals USA, Inc. ("TPI") in the unauthorized Surreply it submitted to buttress its Second Motion to Compel. *See* J. Moreno "Reply" Letter to C. Brown (November 29, 2010) ("Surreply"); *cf.* 49 C.F.R. §1104.13(c).<sup>1</sup> Contrary to TPI's intemperate rhetoric, the written record makes clear that the parties did not reach a full and final mutual agreement concerning waiver of the Board's rules governing the time to bring motions to compel. TPI's Second Motion to Compel – filed more than 120 days after the expiration of the 10 day period allowed by 49 C.F.R. § 1114.31 – is untimely under a straightforward application of governing rules.<sup>2</sup> The Board may decide to excuse TPI's failure to adhere to the Board's rules and requirements and consider the untimely

<sup>1</sup> CSXT requests leave to file this limited further response, necessitated by TPI's unauthorized Surreply. If the Board considers TPI's Surreply, fairness requires that it consider CSXT's response to the new allegations, documents, and accusations raised by TPI in that Surreply.

<sup>2</sup> CSXT has not previously insisted on rigid adherence to the 10-day rule established by Section 1114.31. To the contrary, CSXT offered to extend that time by several months, to September 1, 2010. And, despite the fact that the parties did not reach final mutual agreement on that date, CSXT fully intended to abide by the September 1 deadline extension it had proposed. As CSXT made clear in its Opposition, however, TPI filed its Second Motion to Compel more than two months after even that extended deadline, and a full month after the close of all discovery under the procedural schedule established by the Board. *See* CSXT Reply in Opposition to TPI Second Motion to Compel at 5-7 (Nov. 24, 2010).

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Motion on the merits, but it should not do so based on TPI's selective and distorted account of the facts and the law.

First, the new exhibit that TPI provided for the first time as an exhibit to its Surreply makes clear that CSXT did not agree to an indefinite waiver of the Board's 10-day rule. *See* Attachment 1 to TPI Surreply (June 28, 2010 email exchange). In response to TPI counsel's email request for a waiver of the 10-day rule governing motions to compel, CSXT counsel (who was out of town on vacation) responded, "Yes we will agree to waive the 10-day rule but not on an open-ended basis. Let's discuss later this week." *Id.* (emphasis added).

This message made clear two important points: (1) CSXT was willing to discuss an extension of the time to file motions to compel but was not willing to waive all time limits and would require a deadline in exchange for any limited waiver; (2) the parties had not reached an agreement, and further discussions would be required to attempt to reach an agreement extending the deadline. Contrary to TPI's elliptical, revisionist argument, this email did not constitute a binding agreement to waive all time limits and timeliness arguments for all time. Rather, it was simply an informal expression of willingness to discuss a reasonable (but not unlimited) extension of time.

Second, the very letter that TPI quotes in its Surreply makes clear that TPI's own contemporaneous view was that the parties had not agreed to waiver of the Board's timing rules. In a letter sent approximately two weeks after the email exchange described in the preceding paragraph, TPI counsel effectively acknowledged that the parties had not agreed to a binding waiver or extension of the motion to compel deadline. TPI offered to "wait and see" what CSXT produced based on the following condition

However, TPI can only take this approach if CSXT agrees to extend its waiver of any objection to a motion to compel as untimely under the Board's rules. Therefore, we ask CSXT to provide this waiver . . .

TPI Second Motion, Ex. 2 (July 16, 2010 Moreno Letter to Moates) (emphasis added). As TPI concedes in its surreply, "TPI clearly was aware of the need for a waiver of the 10-day rule . . ." TPI Surreply at 2. To state the obvious, if TPI understood that it already had an agreement waiving the Board's timing regulations without limitation, there would have been no need for it to request that CSXT agree to provide such a waiver.

Third, CSXT's response to TPI's July 16 request for a waiver further clarifies that the parties had not previously reached any agreement concerning waiver. In an effort to accommodate TPI's expressed need for more time to evaluate CSXT's continuing document

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production and determine whether a motion to compel was necessary, CSXT proposed “that the parties agree that motions to compel may be timely filed by either party on or before September 1 [2010]” See TPI Second Motion Ex. 3 (Hemmersbaugh Letter to Moreno) (July 26, 2010). In retrospect, it appears there was no further communication between the parties on the subject of waiver (with the exception of the parties’ oral agreement to extend the mutual deadline for certain types of documents and information that would not be produced until after September 1, none of which is at issue in TPI’s Motion). Because TPI neither objected to CSXT’s proposed September 1 deadline nor proposed an alternative deadline, CSXT proceeded on the (apparently mistaken) understanding that TPI had accepted CSXT’s proposal.

Fourth, the necessary result of TPI’s position that it did not accept CSXT’s proposal is that the parties had no mutual agreement to waive the timing regulations (with the exception noted above), and the 10-day rule remained in force. CSXT had intended and believed that the parties had an effective agreement to extend the deadline to September 1. TPI’s position in this Motion, however, is that it did not agree to the September 1 extension. Because the parties did not agree to any other extension of the deadline (and the record makes clear that CSXT would not agree to an open-ended waiver eliminating deadlines entirely), the result of TPI’s position is that there was no waiver and no extension of the deadline, and the 10-day rule remained in place.<sup>3</sup> In the language of contract formation, it appears there were offers and counteroffers, but no acceptance and no mutually binding agreement. Thus, if TPI’s position were accepted, there was no extension of the period for filing motions to compel (with noted exceptions that are not relevant to this Motion) and the parties continue to occupy the position they would have been in without an agreement: the 10-day rule governs.

Finally, it now appears that the parties may have had a miscommunication. CSXT understood that the parties had effectively agreed to a September 1 deadline. TPI contends in its Surreply that it understood that the parties had agreed there would be no deadline for motions to compel. This may be an unfortunate and regrettable misunderstanding, but it is no ground for the invective and accusations employed by TPI in its Surreply. Moreover, as CSXT explained in its Reply, TPI’s rationale for its late filing does not apply to the subjects of its Motion. The

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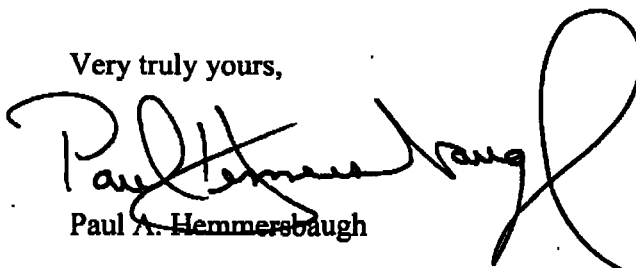
<sup>3</sup> TPI’s position is apparently that because the parties discussed in their discovery conference in early August that both parties would continue to produce documents through September, CSXT implicitly waived any and all timeliness objections to any motion to compel. This is a *non sequitur*. The mere fact that CSXT produced some documents after September 1 does not provide a basis for an implied waiver of its right to object to an untimely motion to compel production of other unrelated documents or information that CSXT had long made clear it would not produce. Under TPI’s theory, so long as a party has not responded to every single discovery request and “follow-up” requests (many of which were effectively new requests seeking information not sought in any prior request) to the complete and final satisfaction of the requesting party, the requesting party may file a motion to compel the other party to produce any other documents or information on any subject addressed by any prior discovery requests, without regard to whether the information sought in the motion has any relation to the outstanding items. For good reason, this is not the law.

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substantial majority of the issues that are the subject of TPI's Motion (refusal to produce SSI; refusal to produce RTC runs that are outdated or do not exist; and refusal to produce State income tax returns) have been clear and ripe for months – the timing of CSXT's production of other documents it agreed to produce provides no justification for TPI's delay in filing its Motion concerning items that CSXT flatly refused to search for or produce from the outset. And in all events, TPI has failed to meet its burden to establish entitlement to the information it seeks to compel and the Second Motion should be denied on the merits.

We appreciate the opportunity to correct the record and clarify CSXT's position in response to TPI's Surreply. If the Board has questions or requires additional information, please contact the undersigned counsel to CSXT.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul Hemmersbaugh", with a large, stylized flourish extending from the end of the signature.

Paul A. Hemmersbaugh

Cc: Jeffrey T. Moreno (by email)  
Other Counsel of Record (by U.S. mail)

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of November, 2010, I caused a copy of the foregoing Response to Allegations and Claims Raised by Complainant Total Petrochemicals USA, Inc. ("TPT") to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

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